

The Texas Commission on Environmental Quality (commission) proposes new §297.2.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The Rio Grande below Fort Quitman is regulated by the Rio Grande Watermaster under Texas Water Code, §11.326 and §11.327. 30 TAC Chapter 303, Operation of the Rio Grande, contains the Rio Grande Watermaster's rules. These rules recognize that the water rights in this area were adjudicated by a court, *State v. Hidalgo County Water Control & Improv. Dist. No. 18*, 443 S.W.2d 728 (Tex. App. - Corpus Christi 1969), *writ ref'd n.r.e.*, and that below Amistad Reservoir, water rights are not based on the priority system (first in time is first in right) as in the rest of the state.

Senate Bill (SB) 1902, and House Bill (HB) 2250, 78th Legislature, 2003, amended Texas Water Code (TWC), §11.3271, Powers and Duties of Rio Grande Watermaster, by amending Subsection (e), and adding Subsections (f) - (k). The provisions of the two bills are identical except for Subsection (j), relating to central repositories for documents.

Subsection (e) of the bills was amended to provide that the Rio Grande Watermaster's duties shall include activities relating to situations of imminent threat to public health and safety or the environment and required that the commission shall adopt rules which define situations of imminent threat and address the watermaster's duties in response to terrorism.

Subsections (f) - (i) provide that the commission may issue a permit which allows a person to place groundwater in the river and store it in a reservoir for release at a later time. The commission is to

write rules which will account for any discharge, delivery, conveyance, storage, diversion, or associated loss of water conveyed down the Rio Grande. The rules must also protect other water right holders which store water in the reservoir and be consistent with the 1944 Treaty between the United States and Mexico. The commission may not issue this permit if it determines that the water to be conveyed would degrade the water quality of the Rio Grande. These permits will be called water-in-transit permits.

Subsection (j) of the two bills requires the watermaster to maintain a place available to the public that will contain copies of documents which the commission requires to be filed in connection with water rights in the lower, middle, or upper basin of the Rio Grande. SB 1902 provides that the watermaster is the “official recorder” of “all instruments, including deeds, deeds of trust, financing statements, security agreements, and liens” filed in connection with water rights. HB 2250 provides that the watermaster shall “maintain a central repository” that includes “certified copies of all instruments, including deeds, deeds of trust, and liens” filed in connection with water rights.

SB 1902 also provides that an instrument should be filed “in the same manner as required by other law for the same type of instrument,” and that “the filing of an instrument under this subsection results in the same legal and administrative status and consequences as a filing under other law for the same type of instrument.” Further, an instrument filed under this law “shall be construed by a court, financial institution, or other affected person in the same manner as an instrument of the same type that is filed under other law.” HB 2250 does not include any of this quoted language, but instead provides that “a lien against a water right shall not be effective against third parties unless a certified copy of the

instrument is filed with the watermaster,” but that the law “does not affect the validity of a lien as between the holder of the water right and the holder of the lien or the requirements or validity of any other law governing the perfection and recordation of these instruments.”

Both bills allow a fee to be collected for filing these instruments. SB 1902 further states that the commission shall adopt rules which “prescribe the procedures necessary for the proper implementation of this subsection, including reasonable transition provisions, if appropriate.”

To implement this legislation, the commission proposes to concurrently amend this chapter; 30 TAC Chapter 295, Water Rights, Procedural; and 30 TAC Chapter 303; Operation of the Rio Grande.

The proposed rule implements the provisions of the two bills. Concerning rules for terror threats, the proposed commission rules require the Watermaster to communicate with the agency Homeland Security Coordinator if activities are noted which may be suspicious. Concerning the bed and banks provisions of these two bills, the commission proposes procedures that will protect existing surface water right holders in the Rio Grande and will allow the commission and State of Texas to comply with the Rio Grande Treaty between the United States and Mexico.

Concerning the provisions of the bills relating to filing documents with the Rio Grande Watermaster, the two bills are in conflict relating to the effect of filing and failure to file. The commission has determined that it should not adopt rules relating to the legal effect of filing or failing to file documents with the Rio Grande Watermaster because the commission does not regulate these matters. Therefore,

the commission leaves the questions of the ramifications and effect of filing or failing to file documents with the commission to interpretation of the statutes by the courts. These rules would provide procedures for filing documents with the Rio Grande Watermaster.

The new rule in this chapter would provide that water-in-transit permits are not governed by this chapter but that Chapter 303 contains the requirements for these water-in-transit permits.

SECTION DISCUSSION

Proposed §297.2 provides that this chapter does not apply to water-in-transit permits. These permits are governed by Chapter 303.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Grants Management Section, has determined that, for the first five-year period the proposed new rule is in effect, fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rule. The proposed amendments address additional duties and responsibilities of the Rio Grande Watermaster as well as procedures to allow for the storage of water-in-transit in the Rio Grande system. No fiscal implications are anticipated for local governments since typically they do not transport water to sell to customers outside their constituency base. A local government would be subject to the same costs as other entities holding this type of water right if it decides to apply for a water-in-transit permit.

The proposed rulemaking seeks to implement provisions of SB 1902 and HB 2250, 78th Legislature, that amended the Texas Water Code and affected the duties and functions of the Rio Grande Watermaster. The rulemaking proposes changes to Chapters 295, 297, and 303 of the Texas Administrative Code. The proposed amendments to Chapters 295 and 297 provide that water-in-transit permits for the Rio Grande are governed by provisions in Chapter 303 instead of Chapters 295 and 297.

The proposed rulemaking would implement provisions to: give the Rio Grande Watermaster the authority to take actions when there are imminent threats to public health, public safety, and the environment; provide for the permitting of privately owned groundwater that an owner may wish to sell and transport (water-in-transit) to a buyer using the Rio Grande River and its reservoirs as a means of delivery; and maintain, for public use, a central repository that includes certified copies of instruments the commission requires to be filed in connection with water rights in the lower, middle, and upper Rio Grande basins.

The proposed rulemaking will require the Rio Grande Watermaster to modify the water accounting methods currently in use. New procedures to issue a permit for this type of water right will have to be developed. It will be necessary to investigate and verify the increased volume and diversions of water flowing through the Rio Grande system because of these new permits. Daily monitoring and evaluation will be needed to compute the direct and indirect losses of privately owned water put into, and diverted from, the Rio Grande system so that current existing water rights will not be impacted by this new water right.

This proposed rulemaking may generate additional fee revenue for the agency. Revenue generated by application fees under this proposed rulemaking may range from \$100 to \$53,000 per application depending on the size and type of the groundwater source. Revenue from recording fees would also be generated at \$1.25 per page of the application. Revenue from annual assessment fees for water-in-transit will be determined by the water holder's apportioned share of fees needed to cover Rio Grande Watermaster operations. This fee, which varies on an annual basis, could be as much as \$45,000 per 100,000 acre-feet of water-in-transit.

Fees assessed to administer the Watermaster programs are deposited into the Watermaster Administration Account 158. The amount of fee revenue available for use by the agency to administer the Watermaster programs is determined through the legislative appropriations process. Projected revenue collected in this account is approximately \$2.2 million over the 2006/2007 biennium. Of this amount, the agency is authorized to use \$1.7 million in the 2006/2007 biennium. Currently, additional revenue generated by water-in-transit permits could not be used to cover the cost of implementing the proposed rulemaking. The agency submitted an exceptional item request in its Legislative Appropriation Request for Fiscal Years 2006 and 2007 to allow it to use the total amount of revenue collected in Account 158 to administer the Watermaster programs, however, this exceptional item request was not approved. The agency will again submit an exceptional item request in its Legislative Appropriation Request for Fiscal Years 2008 and 2009 to allow usage of the total amount of revenue collected.

This proposed rulemaking would have a number of operational impacts for the Rio Grande Watermaster. The costs of developing and implementing the procedures needed to account for additions and diversions of water-in-transit, monitor and investigate water activities on a daily basis, and establish and maintain a central repository for required documentation of water rights within the Rio Grande Watermaster division is estimated to be \$90,000 per year, roughly the equivalent of three full-time employees at the level of a Watermaster Specialist I.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed new rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be the possible availability of more water in a region where water is scarce, greater accessibility to public records pertaining to water rights in the Rio Grande basins, and increased protection of public health, public safety, and the environment when situations of imminent threat arise.

Fiscal implications are anticipated for businesses and individuals who apply for a water-in-transit permit under this proposed rulemaking. Costs for obtaining this type of permit would vary depending on the characteristics of the site and the number of acre-feet of water placed in the system.

Applicants will be required to conduct a hydrological assessment of the water source, which staff experience indicates could cost between \$15,000 to \$30,000, depending on the location and geological formation of the groundwater aquifer. Geological engineering models may be required to complete the evaluation regarding any groundwater surface water connection. Applicants will also be required to

publish notices in the newspapers of 16 counties of the Rio Grande Water division for which they intend to obtain this type of permit. This cost is estimated to be between \$300 to \$500 per newspaper publication. Applicants will also have to mail a notice to the 1,600 water right account holders in the Rio Grande Watermaster division costing approximately \$600 total. Applicants will also have to pay an application fee and a user fee for the permit. These costs could range from \$100 to \$52,000, depending upon the amount of water discharged for transit. These fees are based on the amount of water that is being transported and therefore increases if more water is used. There is a \$50,000 maximum on use fees. Recording fees will be \$1.25 per page of the permit application. Fees for filing copies of liens will be assessed at \$16 for the first page and \$2.00 for each additional page of the document. If a water-in-transit right had to be amended, the applicant would have to pay \$100 per amendment. A water-in-transit holder would have to pay an annual assessment fee that all water right holders in the Rio Grande division pay. This fee varies from year to year, but a water-in-transit permit holder could pay as much as \$45,000 per each 100,000 acre-feet of water-in-transit, depending on the annual assessment rate calculated by the watermaster and approved by the commission to provide for compensation of all watermaster activities multiplied by the authorized amount of water both discharged into the Rio Grande and maximum authorized diverted and the intended and authorized use of that water. Entities with this type of water right will be required to install pumping and metering equipment. Pumping equipment ranges from an estimated \$800 - \$5,000 per unit, and metering equipment will cost about \$500 per site.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses due to the administration and implementation of the proposed rule. Small and micro-businesses are not expected to apply for a water-in-transit permit. If a small or micro-business elected to obtain a water-in-transit permit, it would be subject to the same costs that other entities pay to obtain that permit.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking for Chapter 297 in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in the act. The intent of the rulemaking is to indicate that this chapter does not apply to water-in-transit permits and to refer the reader to Chapter 303 for the requirements for those permits. The purpose of the rule is not to protect the environment or reduce risk to human health due to environmental exposure.

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in the act. The

intent of the rulemaking concerning terror threats is not to reduce risks to human health from environmental exposure, but to provide new duties for the Rio Grande Watermaster relating to actions during terror threats. The rules relating to terror threats could be considered to protect the environment. However, these rules do not exceed a standard set by federal law, exceed an express requirement of state law, or exceed a requirement of a delegation agreement or contract between the state and an agency of the federal government, and these rules are not adopted under the general powers of the agency instead of a specific state law. The rules relating to bed and banks permits are not for the purpose of protecting the environment or protection from environmental exposure, but are to allow the conveyance and storage of groundwater in the river and to protect existing water rights. The recordkeeping rules are not for the purpose of protecting the environment or reducing risks from environmental exposure but are to provide a local public place for documents to be filed.

The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. These rules are simply a procedural statement which refers the reader to another chapter for water-in-transit permit requirements. Thus, these new rules do not constitute a taking under the Texas Government Code.

The commission evaluated the proposed rule and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. Concerning actions to be taken by the Rio Grande

Watermaster due to terror threats, the rules are written in response to a real and substantial threat to public health and safety, are designed to significantly advance the health and safety purpose, and do not impose a greater burden than is necessary to achieve the health and safety purpose.

For the bed and banks permits and the recordkeeping requirements of the rules, none of the exceptions in §2007.003(b) apply to this rulemaking. The specific purpose of these proposed rules is to allow the commission to issue bed and banks permits for conveyance of groundwater to be stored in a reservoir, and to provide new duties for the Rio Grande Watermaster relating to bed and banks permits for conveyance of groundwater to be stored in a reservoir, recordkeeping, and monitoring water right activities in the Rio Grande basin. The proposed rules would substantially advance this stated purpose by providing procedures for each of these duties.

There are no burdens imposed on private real property due to these rules requiring the Rio Grande Watermaster to issue bed and banks permits and keep records. The rules on recordkeeping do not impact real property. The rules relating to these bed and banks permits in the Rio Grande are specifically written to prevent any impact on their property because under the “Rule of Capture” persons may pump water from their land if they are not wasting the water or causing subsidence or other damage to other land. These rules do not affect that law. Additionally, a permittee will not be allowed to remove all of the water put into the river under the permit. This limit on how much water can be taken from the river is necessary to protect water right holders and to comply with the 1944 Treaty, both of which are required in Texas Water Code, §11.3271. Thus, these new rules do not constitute a taking under the Texas Government Code.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rules and found that they are neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). The purpose of the rulemaking is to provide notice that this chapter does not apply to applications for water-in-transit in the Rio Grande and to provide a cross-reference to rules that are applicable to water-in-transit in the Rio Grande. Therefore, the proposed rule is not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

SUBMITTAL OF COMMENTS

Comments may be submitted to Joyce Spencer, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808.

All comments should reference Rule Project Number 2004-014-295-CE. Comments must be received by 5:00 p.m., May 30, 2006. Copies of the proposed rules can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Tracy Callen, Field Operations Division, at (512) 239-4127.

SUBCHAPTER A: DEFINITIONS AND APPLICABILITY

§297.2

STATUTORY AUTHORITY

The new section is proposed under amendments to Texas Water Code, TWC, §11.3271, which provides that the Rio Grande Watermaster's duties include activities related to situations of imminent threat to public health and the environment, storing water in a reservoir for release at a later time, water-in-transit that is being conveyed down the bed and banks of the Rio Grande under a permit and rules issued by the commission, and maintaining a central repository for the public that includes certified copies of instruments that the commission requires to be filed in connection with water rights in the lower, middle, or upper basin of the Rio Grande and that are subject to a water right. The proposed new section is also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.013(1), which provides that the commission has general jurisdiction over water and water rights including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights.

This proposed new rules implement TWC, §11.3271, and TWC, §5.103.

§297.2. Water-in-Transit in the Rio Grande.

_____ This chapter only applies to applications for water-in-transit in the Rio Grande to the extent that the rules for water-in-transit applications in the Rio Grande in Chapter 303 of this title (relating to Operation of the Rio Grande) do not govern or do not expressly conflict with this chapter. The applicable rules for water-in-transit in the Rio Grande are in Chapter 303 of this title.